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No. 90-71 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

P.A. HACKLER, DELORES HACKLER, KENNETH D. MOORE, MARY L. MOORE, KEMAL SAIED, AND CONSTANCE G. SAIED,

Petitioners,

v.

R. DOBIE LANGENKAMP, SUCCESSOR TRUSTEE OF THE BANKRUPTCY ESTATES OF REPUBLIC TRUST & SAVINGS COMPANY AND REPUBLIC FINANCIAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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August 2, 1990

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QUESTIONS PRESENTED

I. Did the Tenth Circuit Court of Appeals correctly hold that the 1978 version (rather than the later 1984 version) of 11 U.S.C. § 547(c)(2) still controlled adversary *proceedings* in a bankruptcy *case* that was itself commenced before the 1984 version went into effect?

II. Did the Tenth Circuit Court of Appeals correctly hold that each Petitioner had no due process right to receive bankruptcy notices (and therefore no setoff defense against Respondent Trustee's preference challenge), given that each Petitioner was merely a preference defendant who had no bankruptcy "claim" against the bankruptcy estate and who therefore did not qualify as a bankruptcy "creditor" entitled to bankruptcy notices?

LIST OF PARTIES

All Petitioners and Respondent are named in the caption. All parties before the U.S. Tenth Circuit Court of Appeals are parties in certiorari petition #90-71 pending before this Court, except the following parties who all elected not to join in petition #90-71: C. A. Culp, Julia Culp, Culp Distributing Company, Leroy Dennis, Janet Dennis, and Hattie Lou Gesin. *See* certiorari petition #90-71 at ii n.1.

RULE 29.1 STATEMENT

As required by Rule 29.1 of this Court, Respondent lists below the parent companies, subsidiaries, or affiliates of (i) Republic Trust & Savings Company, and (ii) Republic Financial Corporation. Respondent became the successor trustee for the bankruptcy estates of these two corporations.

A. *Concerning Republic Trust & Savings Company:* Republic Trust & Savings Company also did business as Western Trust & Savings Company. Republic Trust & Savings Company was owned by Republic Bancorporation, Inc., which was owned by Republic Bancorporation, Inc. of Oklahoma. All of the stock of Republic Bancorporation, Inc. of Oklahoma was owned by the McKinney Children's Trusts. The trustees of the McKinney Children's Trusts were Wesley R. McKinney and Wilma Wood. The beneficiaries of the trusts were the children of Wesley R. McKinney. Republic Trust & Savings Company had no corporate subsidiaries.

B. *Concerning Republic Financial Corporation:* Republic Financial Corporation was owned by Republic Bancorporation, Inc., which was owned by Republic Bancorporation, Inc. of Oklahoma. All of the stock of Republic Bancorporation, Inc. of Oklahoma was owned by the McKinney Children's Trusts. The trustees of the McKinney Children's Trusts were Wesley R. McKinney and Wilma Wood. The beneficiaries of the trusts were the children of Wesley R. McKinney. Republic Financial Corporation had no corporate subsidiaries.

C. Republic Trust & Savings Company and Republic Financial Corporation were affiliates. They had no other affiliates except as set forth above.

D. Respondent, R. Dobie Langenkamp, is the duly appointed Successor Trustee of the Bankruptcy Estates of Republic Trust & Savings Company and Republic Financial Corporation.

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No. 90-71

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P.A. HACKLER, DELORES HACKLER, KENNETH D. MOORE, MARY L. MOORE, KEMAL SAIED, AND CONSTANCE G. SAIED,

Petitioners,

v.

R. DOBIE LANGENKAMP, SUCCESSOR TRUSTEE OF THE BANKRUPTCY ESTATES OF REPUBLIC TRUST & SAVINGS COMPANY AND REPUBLIC FINANCIAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent R. Dobie Langenkamp, Successor Trustee of the Estates of Republic Trust & Savings Company and Republic Financial Corporation ("Trustee" or "Respondent") asks this Court to deny the request of Petitioners P. A. Hackler, Delores Hackler, Kenneth D. Moore, Mary L. Moore, Kemal Saied, and Constance G. Saied (respectively, the "Hacklers," the "Moores," and the "Saieds"; collectively "Petitioners") for a writ of certiorari to the Tenth Circuit Court of Appeals.

OPINIONS BELOW

The Tenth Circuit's opinion below is officially reported

at 897 F.2d 1041 (10th Cir. 1990). P.A. at B-1.[1] That opinion affirmed two holdings, key here, in a consolidated order of the U.S. District Court for the Northern District of Oklahoma, which held against Petitioners and in favor of the Trustee. P.A. at C-1. The district court's order itself affirmed the same holdings in unconsolidated judgments of the Bankruptcy Court for the Northern District of Oklahoma. P.A. at D-1, E-1, F-1. In all courts below, the relevant two holdings concern the applicability of a 1984 amendment to 11 U.S.C. § 547(c)(2) and the status of Petitioners as bankruptcy "creditors."

JURISDICTION

The Tenth Circuit Court of Appeals filed its opinion on March 5, 1990, and denied rehearing on April 10, 1990. P.A. at A-1. Jurisdiction lies under 28 U.S.C. § 1254(1) for this Court to review the final decision of the Tenth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

This case involves the following constitutional provisions, statutes, and regulations, which are fully reprinted in either Petitioners' Appendix ("P.A.") or Respondent's Appendix ("R.A."): U.S. Const. amend. V; 11 U.S.C. §§ 101(4)(A), 101(9), 301, 302, 303, 502(d), 502(h), 506(d), 521(1), 547(b), 547(c)(2) (1978 & 1984 versions),

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[1]Petitioners' Appendix is cited as "P.A. at _____." The Appendix to Respondent's Brief in Opposition is cited as "R.A. at _____." The certiorari petition itself (#90-71) is cited as "Pet. at _____."

548, 550, 554(b), 1126(a), 1141(d)(1); 28 U.S.C. §§ 157(b), 1334(b); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, secs. 462(c), 553(a), 98 Stat. 333, 378, 392 (1984); Fed. R. Civ. P. 7(a), 12(b), 13; Bankruptcy Rules 2002(b), 3017(d), 7001, 7007, 7012.

STATEMENT OF THE CASE

The certiorari petition here (#90-71)[2] involves two questions presented to all three courts below:

(1) whether the 1978 version or the 1984 version of 11 U.S.C. § 547(c)(2) applies to Petitioners as bankruptcy preference defendants; and

(2) whether Petitioners qualified as bankruptcy "creditors" for purposes of receiving notice and voting to confirm a reorganization plan.

The Hacklers, the Moores, and the Saieds presented these very questions to the bankruptcy court, the district court, and the Tenth Circuit. The three lower courts correctly resolved both questions against Petitioners this way:

Concerning question (1), the 1978 version of § 547(c)(2) applied because the bankruptcy case here was commenced

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[2]Though arising from the same Tenth Circuit decision, petition #90-71 here has nothing to do with certiorari petition #90-93 filed by Trustee R. Dobie Langenkamp (Respondent here in #90-71). In #90-93, Trustee Langenkamp as Petitioner challenges the jury trial misgranted by the Tenth Circuit to the Culps and the Dennises, who are the only Respondents in #90-93 and who elected not to appear as parties here in #90-71. The jury trial question of #90-93 is independent and separate from the questions raised by the Hacklers, the Moores, and the Saieds here in #90-71. These people are not parties in Trustee Langenkamp's petition #90-93 and will not be affected by the jury trial outcome of #90-93.

before the 1984 version became effective. That the Trustee's *preference proceedings* against Petitioners began after the 1984 version became law is immaterial. The statutory key is when the *bankruptcy case* commenced, and this commencement undisputedly occurred while the 1978 version was still the law. The 45-day rule of the 1978 version (repealed in the 1984 version) was therefore fully applicable to the Trustee's proceedings against Petitioners as preference defendants.

Concerning question (2), the Tenth Circuit and the district court held that Petitioners simply did not qualify as bankruptcy "creditors." They had no bankruptcy "claim" against the bankruptcy estate when the debtor filed bankruptcy. To this day, they have not disgorged the monetary transfers which they received from the bankruptcy estate and which the Trustee has challenged as bankruptcy preferences. Petitioners are thus preference defendants, nothing more. They do not qualify as bankruptcy "creditors" and thus have no right to receive the kinds of notices that the Bankruptcy Code entitles "creditors" to receive. And since Petitioners are not "creditors," they have no right to vote on whether the reorganization plan should be confirmed. As all three lower courts saw it, then, Petitioners suffered no due process violation. Although the Tenth Circuit did not say so outright, it follows that Petitioners have no setoff defense to repel the Trustee's preference attack.

These conclusions of the courts below accord squarely with the decisions of this Court as well as the decisions of other lower courts. As appears more fully below, Petitioners have shown no basis for certiorari review here.

1. **Applicability of the 45-day rule.** Republic Financial Corporation ("RFC") was an uninsured (non-bank) financial

institution in Oklahoma. RFC raised money by giving investors evidences of RFC debt known as "thrift certificates" or "passbook savings certificates." As each debt matured, the investor would present the certificate for payment by RFC. Petitioners here are six such investors. They presented their certificates and got full payment from RFC. This left no further debt owed to them by RFC.[3]

Within 90 days thereafter, RFC filed bankruptcy on September 24, 1984.[4] This marked the commencement of the bankruptcy case. On that day, Petitioners were owed nothing by RFC and were not entitled to any payment by RFC. Petitioners had no claim against the RFC bankruptcy estate. They thus were not scheduled as *creditors* of RFC and so did not receive any notices that ordinarily must go to *creditors* in a bankruptcy case.

Petitioners assert that 1,100 people were similarly situated. This is not true. Nowhere does the record say this. Petitioners characterize all persons who did not receive notices as a "class of creditors." Pet. at 6. But this glosses over the very question presented to the courts below and jumps to the conclusion that the Tenth Circuit and the district court wrongly held those persons *not* to be bankruptcy creditors.

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[3]Petitioners misdescribe their investments in RFC as "funds on deposit" or "monies on deposit" (Pet. at 4, 5). The Tenth Circuit correctly characterized Petitioners' investment certificates as "debt instruments representing a promise by the issuing party to repay." P.A. at B-7. RFC is not a bank and there are no "deposits" involved here.

[4]Republic Trust and Savings Company ("RTS"), a sister company to RFC, also filed bankruptcy on that day. Preference proceedings concerning the RTS estate were consolidated for trial with the preference proceedings against the six Petitioners.

In October of 1985, the Trustee[5] of RFC commenced adversary proceedings against Petitioners (and others) to avoid and recover payments made to Petitioners by RFC during the 90 days before commencement of the bankruptcy case. Petitioners denied any liability to return the payments. One of their defenses sought to invoke the 1984 version of the "ordinary course" exception in 11 U.S.C. § 547(c)(2). The 1984 version repealed the 45-day rule present in the precursor 1978 version. If applicable, this repeal would favor preference defendants like Petitioners. The 45-day rule shielded from preference attack only those payments which RFC made to Petitioners within 45 days after the debt was incurred. Payments received by Petitioners more than 45 days after the RFC debt was originally incurred would be fully exposed to the Trustee's challenge as preferential transfers made inside the 90-day reachback period of 11 U.S.C. § 547(b).

The RFC bankruptcy case was commenced September 24, 1984. At that time, the 1978 version of the "ordinary course" exception still controlled, with the 45-day rule fully intact in the statute. The amended statute and its repeal of the 45-day rule became effective for all *bankruptcy cases* commenced on or after October 9, 1984. Nevertheless, Petitioners sought the benefit of the amendment solely because the *preference proceedings* against them had been initiated after October 9, 1984. Petitioners saw no importance in the RFC bankruptcy case having commenced

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[5]Jack D. Jones was the initial bankruptcy trustee of RFC and RTS (*see* note 4 *supra*). R. Dobie Langenkamp (Respondent here) was appointed successor trustee of both RFC and RTS. Mr. Langenkamp appears as Respondent here in both trustee capacities because both bankruptcy estates have an interest in the outcome of the certiorari petition here (#90-71). *See* S. Ct. Rule 12.4.

before the 45-day rule had lost its statutory effect. All three courts below, however, recognized this key point. Affirming the district court (which had itself affirmed the bankruptcy court), the Tenth Circuit correctly applied the 1978 version of § 547(c)(2) and its 45-day rule in effect on the day when the RFC bankruptcy case commenced. Since the monetary transfers from RFC to Petitioners were made to satisfy debts more than 45 days old, the Tenth Circuit correctly held that the "ordinary course" exception of § 547(c)(2) was not met by Petitioners. P.A. at B-9 to B-15.

2. **Petitioners' status as "creditors."** The Trustee's Plan of Reorganization of RFC (the "Plan") was filed in December of 1985, and an Order Confirming the Trustee's Plan of Reorganization of RFC was entered in March of 1986.

After the Plan was confirmed, Petitioners as preference defendants filed amended answers in their respective adversary proceedings alleging that they had been denied due process of law in the bankruptcy case by not receiving the notices provided by the Bankruptcy Code to "creditors." Petitioners asserted that because of this lack of notice, they were not bound by the provisions of the Plan. Petitioners also asserted that the alleged due process violation entitled them to a setoff, dollar for dollar, against any judgment which might compel them as preference defendants to return the preferential payments earlier received from RFC.

Here too the courts below were not persuaded by Petitioners' assertions. The district court correctly reasoned that no due process violation had occurred because Petitioners were merely preference defendants, not bankruptcy "creditors." This status they could not have until they returned the preferential transfers made to them by RFC. Until then, Peti-

tioners' status as preference defendants did not entitle them to any notices that normally go to "creditors." And as non-creditors, Petitioners had no right to participate in the proceedings leading to confirmation of the Plan. P.A. at C-14 to C-18.

The Tenth Circuit agreed. Petitioners were simply not entitled to notices in the RFC bankruptcy case because they did not qualify as bankruptcy "creditors." To be "creditors," Petitioners had to be more than merely preference defendants. They had to have bankruptcy "claims" against the RFC bankruptcy estate. This they still lacked at the time, since they had not yet disgorged the preferential transfers. P.A. at B-17 to B-18. Absent "creditor" status, the lack of notice did not constitute any due process violation. Petitioners had actually received all the process they were due. P.A. at B-19 to B-20. Although the Tenth Circuit did not address the issue, this meant Petitioners had no setoff remedy against the Trustee.

SUMMARY OF ARGUMENT

Though it lists three questions, petition #90-71 actually presents only two questions for certiorari review. Neither question shows an inter-circuit conflict, a conflict with any decision of this Court, or a need for this Court to settle any question of federal law. Certiorari relief should thus be denied to Petitioners.

Through the first question presented, Petitioners seek to escape from the 45-day rule in the 1978 version of 11 U.S.C. § 547(c)(2). Petitioners concede that if this rule applies, they cannot use the "ordinary course" exception to defeat the Trustee's preference proceedings against them in the RFC bankruptcy case.

The 45-day rule was repealed in the 1984 version of § 547(c)(2). But the 1984 version applies only to bankruptcy *cases* commenced on or after October 9, 1984. The RFC bankruptcy *case* was undisputedly commenced before then. Therefore, the 1978 version (and its 45-day rule) applies full force to all preference *proceedings* that may be initiated in the RFC case, including the preference proceedings against Petitioners (no matter when these proceedings were initiated).

The Tenth Circuit so held. The holding coincides not only with this Court's recent decision in *Begier v. Internal Revenue Service*, 110 S. Ct. 2258 (1990), but with a truly overwhelming majority of lower court decisions. Certiorari should thus be denied on Petitioners' first presented question.

Through their second presented question, Petitioners seek status as bankruptcy "creditors" so they can assert entitlement to bankruptcy notices that ordinarily must go to bankruptcy "creditors." But Petitioners have never become "creditors" of RFC. They received preferential transfers from RFC within 90 days before bankruptcy. They never returned the preference amounts and the Trustee has not yet recovered those amounts in the preference proceedings.

Petitioners have no right to payment from RFC and therefore hold no bankruptcy "claim." Without a "claim" against the RFC bankruptcy estate, Petitioners cannot qualify as "creditors." They are at most preference defendants. This is not enough to entitle them to bankruptcy notices. The only taking of Petitioners' property will occur, if at all, in the preference adversary proceedings. Contrary to their arguments, then, Petitioners have not been deprived of due process and therefore have no setoff remedy against the Trustee. The Tenth Circuit so held. This holding creates no inter-circuit conflict and accords with the decisions of this Court. Here too certiorari should be denied.

REASONS FOR DENYING CERTIORARI

I. CERTIORARI SHOULD BE DENIED BECAUSE THE TENTH CIRCUIT CORRECTLY APPLIED THE 1978 VERSION OF § 547(c)(2) AND ITS 45-DAY RULE TO A BANKRUPTCY CASE THAT COMMENCED BEFORE THE 1984 VERSION OF § 547(c)(2) EFFECTIVELY REPEALED THE 45-DAY RULE.

A. The 45-day rule controls the RFC bankruptcy case because the rule's repeal did not become effective until after the RFC case had commenced.

On July 10, 1984, Congress enacted the 1984 Bankruptcy Amendments and Federal Judgeship Act, Pub. L. No. 98-353 (the "1984 Act" or "1984 Amendments"). The 1984 Act consists of three titles. Title I amends 28 U.S.C. on jurisdiction and procedure. Title II contains provisions for bankruptcy judgeships. Title III amends 11 U.S.C., the Bankruptcy Code. The key effective date here concerns the Title III amendments and appears in sec. 553(a) of the 1984 Act:

> Sec. 553(a). Except as otherwise provided in this section the amendments made by this title [III] shall become effective to *cases* filed ninety days after the date of enactment of this Act.

Pub. L. No. 98-353, sec. 553(a), 98 Stat. 333, 392 (1984) (emphasis added). The Act's enactment date was July 10, 1984. Since the 90th day thereafter was a holiday, the effective date of the Title III amendments was October 9, 1984. The RFC bankruptcy case was filed earlier, on September 24, 1984.

The statutory effective date has key significance here

because the 45-day rule of 11 U.S.C. § 547(c)(2) [being § 547(c)(2)(B)] was repealed by the 1984 Act. The precursor 1978 version of § 547(c)(2) provided as follows:

> (c) The trustee may not avoid under this section [§ 547] a transfer —
>
> (2) to the extent that such transfer was —
>
> (A) in payment of a debt incurred in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> *(B) made not later than 45 days after such debt was incurred;*
>
> (C) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (D) made according to ordinary business terms.

P.A. at G-3 to G-4 (emphasis added).

In all the preference actions between the Trustee and Petitioners as preference defendants, the parties stipulated that Petitioners had satisfied § 547(c)(2)(A), (C), and (D). The Trustee contends, as all the courts below held, that the 1978 version of § 547(c)(2) governs, that its 45-day rule applies, and that Petitioners did not satisfy the 45-day rule. Petitioners concede that they did not satisfy the 45-day rule, but contend that the 45-day rule does not apply to the preference actions against them.

Pursuant to sec. 553(a) of the 1984 Act, the repeal of the 45-day rule applies only to bankruptcy cases filed on or after October 9, 1984, the statutory effective date of the repealer. The RFC bankruptcy case was filed before the repealer's effective date, but all of the adversary proceedings against

Petitioners were commenced in 1985. Petitioners contend that the word "cases" in sec. 553(a) of the 1984 Act includes adversary proceedings to recover preferential transfers. The Tenth Circuit correctly rejected this contention and concluded that "cases" in sec. 553(a) refers only to bankruptcy cases, not to individual adversary proceedings (like preference actions) that may be initiated within a bankruptcy case. The Tenth Circuit's holding does not conflict with any decision of this Court or any other lower court.

B. The Tenth Circuit's application of the 45-day rule here accords squarely with this Court's recent decision in *Begier*, 110 S. Ct. 2258 (1990).

Petitioners filed their certiorari petition #90-71 on July 9, 1990. A month earlier, this Court expressly rejected Petitioners' incorrect view of "cases" in *Begier v. Internal Revenue Service*, 110 S. Ct. 2258 (1990). American International Airlines, Inc. ("AIA") commenced its bankruptcy case on July 19, 1984. In 1986, Begier, the trustee of AIA, commenced an adversary proceeding to recover preferential transfers allegedly made to the Internal Revenue Service. This Court was aware that the AIA bankruptcy case had been commenced *prior to* the effective date of the 1984 Amendments, and that the trustee's adversary proceeding to recover the preference payments was commenced after the effective date of the amendments — precisely the facts offered by Petitioners here to urge that the 1984 version of § 547 should apply. However, this Court applied the 1978 version of § 547 in *Begier* noting as follows:

> This case is governed by 11 U.S.C. § 547(b) (1982 ed.), which reads: . . . . The statute has been

> amended to replace 'property of the debtor' with 'an interest of the debtor in property.' See n.3, infra. *The old version of § 547(b) applies to this case, however, because AIA filed its bankruptcy petition before the effective date of the amendments.*

Begier, 110 S. Ct. at 2262 n.1 (emphasis added).

The Tenth Circuit's decision to apply the 1978 version of § 547 accords squarely with *Begier*. Certiorari should thus be denied here because the issue raised by Petitioners concerning the applicability of the 1984 Amendments has been answered in *Begier*. Petitioners do not address *Begier*.

C. The Tenth Circuit's application of the 45-day rule here creates no conflict with any other circuit court.

Petitioners claim that the Tenth Circuit's application of the 1978 version of § 547(c)(2) in effect at the time of commencement of the RFC bankruptcy case conflicts with decisions of the Third, Fourth, Sixth, Seventh, and Eleventh Circuits. This seemingly potent assertion is supported by citations to a decision from each mentioned circuit without any discussion or demonstration that the assertion is sound. An examination of the cases relied upon by Petitioners reveals that no conflict exists. In fact, the cases generally do not speak to the issue raised by Petitioners. The circuit courts which have addressed the issue, including several of those relied upon by Petitioners, agree with the Tenth Circuit and are in accord with this Court's *Begier* decision.

The Eleventh Circuit decision *In re Chase & Sanborn Corp.*, 813 F.2d 1177 (11th Cir. 1987) relied upon by Petitioners involved an interpretation of 11 U.S.C. § 548. That

decision did not depend in any way upon which version of § 548 was used, and the Court did not address or consider sec. 553(a) of the 1984 Act.

Another decision offered by Petitioners is *Matter of Xonics Imaging, Inc.*, 837 F.2d 763 (7th Cir. 1988). The court in *Xonics Imaging* did not mention, much less analyze, either sec. 553 of the 1984 Act or the applicability of the 1984 Amendments to the adversary proceeding before it.

However, the Seventh Circuit *did* address the applicability of the 45-day rule arising in a pre-1984 Amendments bankruptcy case. *See In re Energy Co-Op, Inc.*, 832 F.2d 997 (7th Cir. 1987). There, the Seventh Circuit applied the 1978 version of § 547(c)(2) after reasoning just as the Tenth Circuit did here:

> Congress amended § 547(c)(2) in 1984 by deleting the requirement that the debtor make the transfer 45 or fewer days after incurring the debt. Pub. L. No. 98-353, § 462(c), 98 Stat. 378 (1984). The 45-day requirement still applies in this case because the 1984 Amendments apply only to bankruptcy cases filed 90 days after July 10, 1984.

832 F.2d at 1000 n.2.

Petitioners also rely upon *In re K. C. Machine & Tool Co.*, 816 F.2d 238 (6th Cir. 1987), in which the court quoted the 1984 version of § 554(b) (concerning abandonment). 816 F.2d at 245. The court noted that the 1984 amendment to § 554(b) merely clarified existing case law and congressional intent. *Id.* The court did not consider, discuss, or mention sec. 553(a) of the 1984 Act.

Petitioners also refer to *Estate of Lellock v. Prudential Ins. Co.*, 811 F.2d 186 (3d Cir. 1987). There the court quoted

the 1984 version of § 506(d), *see* 811 F.2d at 188, but noted that the result would be the same under either the 1978 or 1984 version of § 506(d). *See* 811 F.2d at 188 n.1. In *Lellock*, the Third Circuit was not required to interpret sec. 553(a) of the 1984 Act and did not do so.

When the Third Circuit *has* considered the applicability of the 1984 Amendments, it has found that the amendments do not apply to bankruptcy cases commenced prior to the statutory effective date of October 9, 1984. *In Matter of Tressler*, 771 F.2d 791 (3d Cir. 1985), the court noted:

> This and all other statutory references do not reflect the 1984 amendments to the Act, since these amendments only apply to cases filed after October 8, 1984. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §553, 98 Stat. 333, 392 (1984). This case was filed on May 3, 1984 [referring to the date of commencement of the Tressler bankruptcy].

771 F.2d at 792-93 n.1.

Petitioners' reliance on *In re Harbour*, 840 F.2d 1165 (4th Cir. 1988), *vacated sub nom. Perkinson v. Huffman*, 109 S. Ct. 3234 (1989), to create an inter-circuit conflict is likewise misplaced. The opinion in *Harbour* was vacated by this Court in 1989.

The Ninth Circuit, not mentioned by Petitioners, can be counted among the several circuits which have directly addressed the issue of the applicability of the 1984 Amendments to preference actions and which have found that the amendments do not apply to adversary proceedings in bankruptcy cases commenced prior to the October 9, 1984 effective date of the 1984 Act:

The Bankruptcy Code was amended by the Bank-

> ruptcy Amendments and Federal Judgeship Act of 1984. Pub.L. No. 98-353, § 553(a), 98 Stat. 333, 392 (1984). However, those amendments do not apply to this case because BRNA filed its bankruptcy petition in 1983. *Id.; see Henderson v. Allred (In re Western World Funding, Inc.)*, 54 B.R. 470, 473 n.1 (Bankr. D. Nev. 1985). Accordingly, all references in this decision to the Bankruptcy Code are to the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 (1982).

In re Bullion Reserve of North America, 836 F.2d 1214, 1217 n.2 (9th Cir.), *cert. denied*, 486 U.S. 1056 (1988).

In sum, all other circuit courts which have squarely confronted the issue of applicability of the 1984 Amendments have found that the amendments do not apply in bankruptcy cases commenced prior to the effective date of the 1984 Amendments. This is exactly what the Tenth Circuit has held here. Therefore, no inter-circuit conflict exists to warrant a grant of certiorari review.

As the Tenth Circuit recognized, Petitioners have unsoundly suggested throughout that when Congress fixed the effective date of the 1984 Amendments in sec. 553(a) of the 1984 Act, Congress blurred the established difference between "case" and "proceeding." A "case" refers to the bankruptcy case commenced with the filing of a bankruptcy petition. *See* 11 U.S.C. §§ 301, 302 and 303. A trustee's action to avoid and recover a preferential transfer is a "proceeding" which arises in a case under Title 11 of the United States Code. *See* 11 U.S.C. §§ 547, 550, 28 U.S.C. §§ 157(b), 1334(b); Bankruptcy Rule 7001. The official advisory committee note to Bankruptcy Rule 7001 is particularly helpful in understanding the distinction between "cases" and

"proceedings" in bankruptcy law:

> *Proceedings* to which the rules in Part VII apply directly include those brought to avoid transfers by the debtor under §§ 544, 545, 547, 548 and 549 of the Code; subject to important exceptions, *proceedings* to recover money or property; *proceedings* on bonds under Rules 5008(d) and 9025; *proceedings* under Rule 4004 to determine whether a discharge in a chapter 7 or 11 *case* should be denied because of an objection grounded on § 727 and *proceedings* in a chapter 7 or 13 *case* to revoke a discharge as provided in §§ 727(d) or 1328(e); and *proceedings* initiated pursuant to § 523(c) of the Code to determine the dischargeability of a particular debt. Those *proceedings* were classified as adversary *proceedings* under former Bankruptcy Rule 701.

Bankr. Rule 7001 advisory committee's note, 11 U.S.C.A. (1984)(emphasis added). The Tenth Circuit's decision here recognizes this established distinction. P.A. at B-12 to B-13.

The overwhelming majority of court decisions concur with the Tenth Circuit's conclusion that the word "cases" in sec. 553(a) of the 1984 Act means the bankruptcy case commenced with the filing of the bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303, and have applied the 1984 Amendments accordingly. *See, e.g., In re Bullion Reserve of North America,* 836 F.2d at 1217 n.2; *In re Energy Co-op, Inc.*, 832 F.2d at 1000 n.2; *Matter of Tressler,* 771 F.2d at 792 n.1; *In re Independent Clearing House,* 77 B.R. 843, 848 n.5 (D. Utah 1987); *In re Hartwig Poultry, Inc.*, 87 B.R. 30, 31 (N.D. Ohio 1988); *In re V.N. Deprizio Const. Co.*, 86 B.R. 545, 548 (N.D. Ill. 1988), *aff'd in part and rev'd in part on other grounds sub nom. Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989); *In re Terminaling, Inc.*,

72 B.R. 752, 760 (S.D. Tex. 1987), *rev'd on other grounds*, 837 F.2d 224 (5th Cir. 1988); *In re Excel Enterprises, Inc.*, 83 B.R. 427, 430-31 (Bankr. W.D. La. 1988); *In re American International Airways, Inc.*, 83 B.R. 324, 329 n.3 (Bankr. E.D. Pa. 1988); *In re Schuman*, 81 B.R. 583, 586 n.2 (Bankr. 9th Cir. 1987); *In re Sounds Distributing, Inc.*, 80 B.R. 749, 751-52 (Bankr. W.D. Pa. 1987); *In re James P. Downing & Co.*, 74 B.R. 906, 911 n.8 (Bankr. N.D. Ill. 1987); *In re Amarex, Inc.*, 74 B.R. 378, 381-82 (Bankr. W.D. Okla. 1987), *aff'd*, 88 B.R. 362, 364 (W.D. Okla. 1988); *In re Tucker Freight Lines, Inc.*, 62 B.R. 210, 212-213 (Bankr. W.D. Mich. 1986); *In re W. L. Mead, Inc.*, 70 B.R. 651, 654 (Bankr. N.D. Ohio 1986); *In re Olson*, 66 B.R. 687, 691 n.3 (Bankr. D. Minn. 1986); *In re Walkington*, 62 B.R. 989, 994 (Bankr. W.D. Mich. 1986); *Matter of Lorandos*, 58 B.R. 519, 521-22 (Bankr. S.D. Ohio 1986); *In re Demetralis*, 57 B.R. 278, 280-82 (Bankr. N.D. Ill. 1986); *In re Currie*, 57 B.R. 224, 229 (Bankr. N.D. Ohio 1986); *In re Ramey Seed Company*, 57 B.R. 425, 427 n.1 (Bankr. D. Minn. 1985); *In re Bellanca Aircraft Corp.*, 56 B.R. 339, 370 n.30 (Bankr. D. Minn. 1986), *aff'd in part, remanded in part on other grounds*, 850 F.2d 1275 (8th Cir. 1988); *Matter of Lamanski*, 56 B.R. 981, 984 n.3 (Bankr. W.D. Wis. 1986); *In re Auto-Pak, Inc.*, 55 B.R. 403, 404 n.1 (Bankr. D.D.C. 1985); *In re Western World Funding, Inc.*, 54 B.R. 470, 473 n.1 (Bankr. D. Nev. 1985); *Matter of Almarc Manufacturing, Inc.*, 52 B.R. 582, 583 (Bankr. N.D. Ill. 1985); *In re Chase & Sanborn Corp.*, 51 B.R. 736, 737-38 (Bankr. S.D. Fla. 1985). All of the foregoing decisions involved application of the 1984 Amendments to preference proceedings under § 547 in a manner consistent with the holding of the Tenth Circuit.

II. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS DO NOT QUALIFY AS BANKRUPTCY "CREDITORS" AND THUS WERE NOT ENTITLED TO RECEIVE NOTICES THAT ORDINARILY MUST GO TO "CREDITORS"; PETITIONERS' NON-RECEIPT OF "CREDITOR" NOTICES NEITHER STATES A DUE PROCESS VIOLATION NOR GIVES PETITIONERS A SETOFF DEFENSE AGAINST THE TRUSTEE'S PREFERENCE CHALLENGE.

A. The Tenth Circuit's classification of Petitioners as merely preference defendants rather than bankruptcy "creditors" does not conflict with any decision of this Court and does not raise any federal question that should be settled by this Court.

Petitioners assert that they were "creditors" within the meaning of the Bankruptcy Code, *see* 11 U.S.C. § 101(9), and therefore were entitled to notice of such things as the RFC disclosure statement and the Plan under Bankruptcy Rules 2002(b) and 3017(d). Petitioners assert that although they refused to return the preferential payments and have vigorously contested the Trustee's recovery efforts, they hold "contingent" claims, within the meaning of 11 U.S.C. § 101(4)(A), and thus are entitled to all of the rights of "creditors" of RFC, including all bankruptcy notices. Petitioners assert that because they were not afforded such notice, their rights to due process were violated. As a remedy, Petitioners say that any "claim" which they may ultimately have under 11 U.S.C. § 502(h) after the Trustee obtains a preference judgment against them must be valued at 100% of the "claim's"

face value and then be offset dollar for dollar against the preference judgment.

Agreeing with the bankruptcy court and the district court, the Tenth Circuit rejected Petitioners' argument and held that Petitioners were not bankruptcy "creditors" of RFC entitled to the claimed notices and that their not receiving such notices did not constitute a due process violation. The Tenth Circuit's holding on this point is fully consistent with the language and spirit of the Bankruptcy Code, the constitutional dictates of due process, and common sense.

The due process ruling of the Tenth Circuit is not in conflict with any holding of this Court, because this precise issue has never been addressed by this Court. Without any discussion or elaboration, Petitioners simply cite this Court's decisions in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); *New York v. New York, New Haven and Hartford R.R.*, 344 U.S. 293 (1953); and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Pet. at 28. Although each of these decisions involves a due process challenge, each arose in a completely different context, and none involves due process requirements concerning bankruptcy notices to preference defendants who do not qualify as bankruptcy "creditors."

Of the above decisions, only *New York* arose in a bankruptcy context. It stands for the proposition that failure to give an existing lien creditor notice of a bar date was a violation of due process, and as a result, a sale of property free and clear of the creditor's liens was ineffective against the lienholder creditor. *See* 344 U.S. at 296-97. The Tenth Circuit's decision here is not in conflict with *New York* because here, unlike

there, Petitioners did not have "claims" and were not "creditors" of RFC. Nor is the Trustee here seeking to totally or forever bar any of Petitioners' claims. As shown more fully below, the Tenth Circuit's holding and reasoning are entirely consistent with the fundamental requirements of due process and the due process decisions of this Court. Petitioners have raised no federal question calling for a decision of this Court.

B. The Tenth Circuit has created no inter-circuit conflict by deciding that Petitioners do not qualify as bankruptcy "creditors" and that they suffered no due process violation.

Again without any discussion or elaboration, Petitioners also assert that the Tenth Circuit's decision conflicts with decisions of the First, Third, Tenth, and Federal Circuits. Pet. at 28-29. Petitioners, however, merely cite to a decision from each such circuit without any discussion or demonstration that these decisions involve the issue presented here. Actually, none of the cited circuit court decisions involves a preference defendant or notice to a preference defendant on matters relating to the confirmation of a reorganization plan. *In re Intaco Puerto Rico, Inc.*, 494 F.2d 94 (1st Cir. 1974), *In re Harbor Tank Storage Co., Inc.*, 385 F.2d 111 (3d Cir. 1967), and *Brumall Industries, Inc. v. Data Design Logic Systems, Inc.*, 786 F.2d 401 (Fed. Cir. 1986), each involved a creditor of a bankrupt debtor, holding an existing right to payment on the date the debtor filed bankruptcy, who was not given notice of the bar date for filing claims or who was not given notice of, and was not included in, the debtor's reorganization plan. None of these cases involves the very different situation of a party like each Petitioner, who does not have a

right to payment from, or a "claim" against, the debtor on either the date of the bankruptcy filing, or at the time of reorganization plan confirmation, and whose claim, like each Petitioner's, would arise, if at all, only if the preferential transfer were returned to the bankruptcy estate. This is the key distinction relied upon by the Tenth Circuit here.

In fact, Petitioners' reasoning and requested relief is totally inconsistent with the very circuit decisions they cite. In *Harbor Tank*, the creditor who was denied notice of the bar date for claims was to be allowed to file its claim and be treated like all other creditors of the debtor in its class. 385 F.2d at 115-16. Petitioners, however, vigorously oppose any attempt to treat any claim arising from a returned preference like that of existing RFC creditors. The courts in *Intaco* and *Brumall Industries*, relying primarily on this Court's decision in *New York*, emphasized that due process required a right to reasonable notice before a creditor's claims were forever barred in bankruptcy. *Intaco*, 494 F.2d at 99, and *Brumall Industries*, 786 F.2d at 406 (both citing *New York*, 344 U.S. at 297). Here, if Petitioners ever have claims against the RFC estate arising under 11 U.S.C. § 502(h), after they return the preference amounts, their claims will not be forever barred but instead will be paid like all existing unsecured creditors' claims under the RFC Plan.

Petitioners also assert that the Tenth Circuit's opinion here contradicts the Tenth Circuit's earlier decision in *Reliable Electric Co. v. Olson Construction Co.*, 726 F.2d 620 (10th Cir. 1984). This argument, and Petitioners' reliance upon *Reliable*, was directly addressed and expressly rejected by the Tenth Circuit here. *Reliable* involved a creditor who held a prepetition claim against the debtor which arose and

was vested prepetition. Because the creditor in *Reliable* had not received notices of various of the bankruptcy proceedings, and because the debtor's funds for distributions under the plan had been fully expended, the court in *Reliable* held that the creditor's prepetition debt was not discharged. In *Reliable*, unlike this case, the lack of notice had deprived the creditor of an actual prepetition claim. The Tenth Circuit, in its opinion here, distinguished its decision in *Reliable*, finding Petitioners' citation "inapposite" and noting that in *Reliable* the creditor, unlike Petitioners, actually presented a claim against the debtor that arose "before confirmation of the Plan." P.A. at B-20 n.5.

C. The Tenth Circuit's decision concerning "creditor" status and due process rests on sound reasoning and a correct view of the law.

Bankruptcy Rule 2002(b) provides that "creditors" shall be given 25 days' written notice of the time fixed for filing objections to, and the hearing to consider approval of, a disclosure statement of a plan. Bankruptcy Rule 3017(d) directs that "all creditors" be mailed copies of the plan and various other documents. Petitioners mistakenly believe that they qualify as "creditors."

"Creditor" means an "entity that has a claim against the debtor that arose *at the time of or before* the order for relief concerning the debtor." 11 U.S.C. § 101(9) (emphasis added). The Code defines "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

11 U.S.C. § 101(4)(A). Petitioners assert that they held "contingent" claims and thus were "creditors." But they were simply not, and still are not, "creditors" of RFC. When the RFC Plan was confirmed, they had no "claim" (right to payment) against RFC that arose on or before the date RFC's bankruptcy petition was filed. Any prepetition "claims" they once may have had for payment from RFC were extinguished when they received full payment for their debt certificates before the RFC bankruptcy.

That Petitioners may become "creditors" in the future upon the Trustee's successful prosecution of the preference actions does not change the fact that they were not "creditors" of RFC at the time of the Plan's confirmation hearing. *Cf. Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 940-944 (3d Cir. 1985). As the Tenth Circuit recognized, any right to payment Petitioners may have against RFC by virtue of the Trustee's recovery or by their return of the preference amounts will arise and exist only if and when the money is recovered or repaid. P.A. at B-17 to B-20.

Petitioners argue that at the time of the Plan's confirmation hearing they were at least "contingent" creditors by virtue of §§ 101(9)(B) and 502(h), which provide that claims arising from the return of preferences are to be subsequently allowed as though they had arisen before the date of filing of the bankruptcy petition. The Tenth Circuit correctly rejected this argument, noting that at this point Petitioners "do not have even a *contingent* right to payment from the debtors' estates." P.A. at B-18 (emphasis added). Although subsequently treated the same as a prepetition claim for purposes of allowance and participation in the Plan, a § 502(h) claim does not "arise," and cannot be allowed or disallowed, until the

preference property is recovered by or paid to the Trustee. *See* 11 U.S.C. § 502(d). The treatment of a claim under § 502(h) does not *ipso facto* mean the claim actually existed prepetition.

This Court recently examined the scope of a "claim" under 11 U.S.C. § 101(4)(A) in *Pennsylvania Dept. of Public Welfare v. Davenport*, 110 S. Ct. 2126 (1990). This Court observed that a "claim" is a "right to payment . . ." and that "the plain meaning of a 'right to payment' is nothing more or less than an enforceable obligation . . . ." 110 S. Ct. at 2131. At the time of the RFC bankruptcy filing, and at the time of the Plan's confirmation, Petitioners did not have, and still do not have, a right to payment from, or an enforceable obligation against, the RFC estate.

Because Petitioners were not "creditors" prior to or at the time of the Plan's confirmation, and still are not "creditors" of the RFC estate, they were not entitled to the notices prescribed by Rules 2002(b) and 3017. Petitioners, in contesting the preference proceedings, deny any liability to return the funds to RFC and thus have chosen not to become "creditors" of the RFC estate. Having done so, they now cannot protest that they should have been afforded the same rights as "creditors" who are actually owed a debt by RFC.

Petitioners provide no authority for the proposition that a preference defendant is a "creditor" entitled to notices under Bankruptcy Rules 2002(b) and 3017(d), or that the Trustee's failure to provide such notices violates either the Bankruptcy Code or Rules. To the contrary, a recent bankruptcy court decision, cited with approval by the district court here but ignored by Petitioners, thoughtfully deals with this precise issue. The decision is based upon indistinguishable facts and

compels the conclusion that Petitioners were not "creditors" or "contingent creditors" of RFC and were not entitled to bankruptcy notices afforded "creditors." *See In re Southern Industrial Banking Corp.*, 66 B.R. 349, 361 (Bankr. E.D. Tenn. 1986). *See also Koch Refining v. Farmers Union Cent. Exchange, Inc.*, 831 F.2d 1339, 1351-52 & n.14 (7th Cir. 1987) (recognizing that preference defendants are not entitled to rights of "creditors" under Bankruptcy Code), *cert. denied*, 485 U.S. 906 (1988); *In re Outlet Company Stores, Inc.*, 82 B.R. 694, 695 (Bankr. S.D.N.Y. 1988).

Despite the absence of notice requirements under the Bankruptcy Code or Rules, Petitioners assert that confirmation of the Plan without providing them notice and an opportunity to be heard constitutes a denial of procedural due process. However, neither the Code, as demonstrated above, nor procedural due process supports this assertion.

As the Tenth Court correctly noted, Petitioners clearly have a property interest in the preferential sums received by them prior to the commencement of the RFC bankruptcy case. But the deprivation of this property interest will occur, if at all, at the conclusion of the adversary proceedings. P.A. at B-19 to B-20. Therefore, no deprivation of property could have occurred at the time of confirmation of the Plan. Thus, the lack of notice of the confirmation hearing and Petitioners' lack of opportunity to vote on the Plan did not deprive them of a constitutionally protected property right without due process of law. P.A. at B-20. *See also In re Southern Industrial Banking Corp.*, 88 B.R. 174, 176-77 (Bankr. E.D. Tenn. 1987).

Notice is constitutionally adequate when "the practicalities and peculiarities of the case . . . are reasonably met."

Mullane, 339 U.S. at 314-15. Petitioners' due process argument suffers from the further infirmity of ignoring the practicalities and peculiarities of the bankruptcy reorganization process. Accepting Petitioners' due process argument would lead to the requirement that actions by a trustee to recover preferential transfers would have to be initiated and fully concluded prior to confirmation of a plan of reorganization. Such a requirement is inconsistent with the Bankruptcy Code and would be both unrealistic and impossible in most if not all bankruptcy cases.

Case law interpreting preference recovery actions certainly recognizes that such proceedings need not be concluded before, and also may be instituted after, a plan of reorganization is confirmed. *See, e.g., In re Galerie Des Monnaies of Geneva, Ltd.*, 55 B.R. 253, 258-60 (Bankr. S.D.N.Y. 1985), *aff'd*, 62 B.R. 224 (S.D.N.Y. 1986); *In re J.E. Jennings, Inc.*, 46 B.R. 167, 170-73 (Bankr. E.D. Pa. 1985); *In re Amarex*, 74 B.R. at 380-81. Yet under Petitioner's reasoning, in order for them to hold an allowed claim, the bankruptcy court would have to fully adjudicate each preference action and determine the amount recoverable by the Trustee, and all preference defendants would have to actually pay the preference judgments prior to allowing their claims and prior to circulating ballots for voting on the Plan. This reasoning is entirely inconsistent with the Bankruptcy Code's statutory scheme.

Petitioners essentially argue that a preference defendant is entitled to both full treatment and participation as "creditors" while at the same time withholding the preference amount. Under Petitioners' reasoning, a transferee who had a valid defense to a preference action (and therefore no liability

under § 550), would be allowed to vote on a plan of reorganization, and to object to a plan, at a time when the transferee has no interest in the estate, and when, if the transferee's defense to the preference were successful, the transferee would never have any such interest. Such a result is expressly prohibited by 11 U.S.C. § 502(d). It is fundamentally unfair to existing "creditors." And it was soundly rejected by the Tenth Circuit. P.A. at B-19 n.4 (calling Petitioners' argument "nonsensical").

11 U.S.C. § 502(h) provides that a § 550 claim, if recovered, shall be *subsequently* allowed *as if* it arose prepetition, clearly indicating that § 550 claims are treated differently than prepetition claims. Furthermore, a debtor is not required to schedule potential preference defendants as "creditors." *See* 11 U.S.C. § 521(1). If Congress had intended a transferee to be scheduled as a "creditor," it could have done so, but it did not. Rather, Congress affirmatively elected another statutory scheme for the treatment of claims arising from preference recovery actions.

Petitioners cannot contend that they would have been entitled to vote on the Plan, in that they could not, by virtue of §§ 502(d) and 502(h), hold an allowed claim necessary to vote. They cite no authority that a preference defendant in their position, with no claim against a bankruptcy estate, is entitled to vote or otherwise participate in reorganization of a debtor. 11 U.S.C. § 1126(a) provides that only the "holder of a claim or interest *allowed* under [§ 502] may accept or reject a plan." A preference defendant whose claim has not been finally adjudicated cannot hold an *allowed* claim until the preference amount has been paid and recovered. *Katchen v. Landy,* 382 U.S. 323, 330 (1966); *In re Simmons,* 705 F.2d

547, 552 (5th Cir. 1985); *In re Colonial Services Co.*, 480 F.2d 747, 749 (8th Cir. 1973); *In re Independent Clearing House Co.*, 41 B.R. 985, 1017 (Bankr. D. Utah 1984); *In re Georgia Steel, Inc.*, 38 B.R. 829, 839-40 (Bankr. M.D. Ga. 1984). Notice to a preference defendant of the disclosure or confirmation hearing therefore is totally unnecessary and superfluous.

Since Petitioners suffered no due process violation, they have no setoff defense to the Trustee's preference challenge. The Tenth Circuit's decision does not address Petitioners' asserted remedy of setoff. But a due process violation is a pre-condition to even reaching the merits of any such remedy. Accordingly, the Tenth Circuit did not have to reach this remedy issue.

CONCLUSION

Petitioners have not shown a single reason for grant of certiorari here. Their petition (#90-71) does not present any question that should be settled by this Court. Their petition does not challenge a lower court decision that conflicts with decisions of this Court. Indeed, the Tenth Circuit's decision goes hand in glove with this Court's recent *Begier* decision. Nor does their petition show any inter-circuit conflict. There-

fore, this Court should not grant certiorari review on the questions presented by Petitioners.

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In accordance with Sup. Ct. R. 24.1(f) and 24.2, other statutes, opinions and materials referred to in Respondent's Brief in Opposition are not set out in this Appendix because they are contained in the Appendix to Petitioners' Certiorari Petition (#90-71).

STATUTES AND REGULATIONS

11 U.S.C. § 101 (1982)

Definitions.

In this title —

* * *

(9) "creditor" means —

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim;

* * *

11 U.S.C. § 301 (1982)

Voluntary cases.

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

11 U.S.C. § 302 (1982)

Joint cases.

(a) A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter.

(b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated.

11 U.S.C. § 303 (1982)

Involuntary cases.

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title —

* * *

11 U.S.C. § 502 (1982)

Allowance of claims or interests.

* * *

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

* * *

11 U.S.C. § 506 (1988)

Determination of secured status.

* * *

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless —

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 521 (1982)

Debtor's duties.

The debtor shall —

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, and a statement of the debtor's financial affairs;

* * *

11 U.S.C. § 547 (1982)

Preferences.

* * *

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of debtor —

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer —

(i) was an insider; and

(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

* * *

11 U.S.C. § 548 (1988)

Fraudulent transfers and obligations.

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily —

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after

the date that such transfer was made or such obligation was incurred, indebted; or

(2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may

be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section —

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution or securities clearing agency that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, takes for value to the extent of such payment; and

(C) a repo participant that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment as defined in section 741(8) of this title, in connection with a repurchase agreement, takes for value to the extent of such payment.

11 U.S.C. § 554 (1988)

Abandonment of property of the estate.

* * *

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

* * *

11 U.S.C. § 1126 (1982)

Acceptance of plan.

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

* * *

28 U.S.C. § 157 (1988)

Procedures.

* * *

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to —

(A) matters concerning the administration of

the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 ~~of title 11~~ but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use of lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

* * *

28 U.S.C. § 1334 (1988)

Bankruptcy cases and proceedings.

* * *

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

* * *